



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 25, 1994

Mr. Anthony C. Grigsby
Executive Director
Texas Natural Resource Conservation
Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR94-409

Dear Mr. Grigsby:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 25127.

The Texas Natural Resource Conservation Commission (the "commission") received an open records request for the following information:

Complete copies of all written public comments, including authors' names, received as a response to the proposed Agreed Order against Texas By-Products, Inc. published in 18 Tex. Reg. 9865-67 on December 21, 1993.

You explain that pursuant to section 382.096 of the Texas Clean Air Act, chapter 382 of the Health and Safety Code, the commission published in the Texas Register a proposed enforcement "Agreed Order" for Texas By-Products, Inc. ("Texas By-Products") and solicited public comment so that the commission may consider whether the Agreed Order is "inappropriate, improper, inadequate, or inconsistent with the requirements of" the Clean Air Act. Tex. Nat. Res. Conserv. Comm., 18 Tex. Reg. 9865 (1993); *see* Health & Safety Code § 382.096. The notice of the Agreed Order specifies, among other things, the commission rules that Texas By-Products allegedly violated and the proposed civil penalty that the commission intended to impose. *See* Tex. Nat. Res. Conserv. Comm., 18 Tex. Reg. 9867.

You have submitted to this office two letters that the commission received in response to its published notice, portions of which you contend come under the protection of the "informer's privilege," as incorporated into section 552.101 of the Government Code. In *Roviaro v. United States*, 353 U.S. 53, 59 (1957), the United States Supreme Court explained the rationale that underlies the informer's privilege:

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. [Citations omitted.] The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

Although the privilege ordinarily applies to the efforts of law enforcement agencies, it may apply to administrative officials with a duty of enforcing particular laws. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 285 at 1 (1981); 279 at 1-2 (1981); *see also* Open Records Decision No. 208 (1978) at 1-2. This may include enforcement of quasi-criminal civil laws. *See* Open Records Decision Nos. 515 (1988) at 3; 391 (1983) at 3. You contend that the informer's privilege protects the identity of the two individuals who responded to the published notice because "these comments are functionally no different from complaints received at our regional offices concerning potential violations of rules and regulations which this agency enforces."

In Open Records Decision No. 391 (1983) this office held that the informer's privilege protects the identity of individuals who make complaints to the Air Control Board (now, the commission) regarding air pollution. In so doing, this office overruled to the extent of conflict Attorney General Opinion H-276 (1974), which had interpreted language in former section 2.13 of article 4477-5, V.T.C.S. (now section 382.040 of the Clean Air Act) as making public virtually all commission records. *But see* Health & Safety Code § 382.041 (formerly section 1.07 of article 4477-5) (restricting commission's release of certain information relating to secret processes or methods of manufacture or production). Open Records Decision No. 391 concluded that former section 2.13, which provided that "all records of the [Texas Air Control Board] are public records open to inspection by any person during regular office hours," applied only to records pertaining to "any proceeding or other official act of record . . .," *see* former V.T.C.S. art. 4477-5, § 2.14 (repealed by Acts 1989, 71st Leg., ch. 678, § 13(1)). The decision thus concluded that the commission may withhold from the public, pursuant to the informer's privilege, information tending to identify citizens who file pollution complaints with the commission.

We distinguish the records before us from those at issue in Open Records Decision No. 391. Here the requestor has sought records pertaining directly to a "proceeding or other official act of record," *i.e.*, a formal enforcement proceeding for which the commission must solicit public comment before its enforcement action becomes final.¹ Under the rationale used by Open Records Decision No. 391, the records at issue here are precisely the types of records that section 382.040 of the Health and Safety Code makes public. Accordingly, the commission must release these two records in their entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Kymerly K. Oltrogge
Assistant Attorney General
Open Government Section

KKO/RWP/rho

Ref.: ID# 25127

Enclosures: Submitted documents

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(w/o enclosures)

¹Thus, we need not here reconsider Open Records Decision No. 391. We note that, in 1991, the legislature repealed section 381.021 of the Health and Safety Code (formerly V.T.C.S. art. 4477-5, § 2.14). See Acts 1991, 72d Leg., 1st C.S., ch. 3, § 1.098(a), at 4, 46.